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to: Sheldon D. Schwartz
 National Director, Tax Forms and Publications Division
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from: Assistant Chief Counsel (Income Tax & Accounting) CC:IT&A

subject: Treatment of Ostriches, Emus, and Rheas as Section 1231
 Property

This responds to your June 23, 1995 request for technical assistance in determining whether ostriches, emus, and rheas can qualify as section 1231 property.

ISSUE

Are ostriches, emus, and rheas held for breeding purposes "livestock" as defined by section 1231(b)(3) of the Internal Revenue Code and therefore "property used in the trade or business" (section 1231 property) for purposes of section 1231?

CONCLUSION

Section 1.1231-2(a)(3) of the Income Tax Regulations states that the term "livestock" does not include "poultry, chickens, turkeys, pigeons, geese, other birds, fish, frogs, reptiles, etc." Since ostriches, emus, and rheas are birds, they cannot be livestock, and therefore they cannot be section 1231 property, even if they are held for breeding purposes.

FACTS

On page 58 of the 1994 edition of Publication 225, Farmer's Tax Guide, you added exotic birds (ostriches, emus, and rheas) to the list of animals that do not qualify as section 1231 property. You recently received information that indicates, as an example, that these birds have an extended breeding life and that a sexually mature pair of ostriches can cost as much as \$60,000.

LAW AND ANALYSIS

Section 1231 of the Code contains special rules for how to treat gains or losses on "property used in the trade or

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business." Section 1231(b) defines "property used in the trade or business" (which is often referred to as "section 1231 property"). Section 1231(b)(3), which concerns livestock, states that the term "property used in the trade or business" includes "(A) cattle and horses, regardless of age, held by the taxpayer for draft, breeding, dairy, or sporting purposes, and held by him for 24 months or more from the date of acquisition, and (B) other livestock, regardless of age, held by the taxpayer for draft, breeding, dairy, or sporting purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry."

Section 1.1231-2(a)(3) of the Income Tax Regulations states that "[f]or purposes of section 1231, the term 'livestock' is given a broad, rather than a narrow, interpretation and includes cattle, hogs, horses, mules, donkeys, sheep, goats, fur-bearing animals, and other mammals. However, it does not include poultry, chickens, turkeys, pigeons, geese, other birds, fish, frogs, reptiles, etc." Since ostriches, emus, and rheas are "other birds," they cannot, under the regulation, be section 1231 property.

We have also examined the history of section 1231 of the Code to determine whether there should be an exception for ostriches, emus, and rheas. The predecessor of section 1231 is section 117(j) which was added to the Code by section 151(b) of the Revenue Act of 1942. The reference to livestock was added to section 117 by section 324 of the Revenue Act of 1951, which stated "[s]uch term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry." See Harry M. Halstead, Capital Gains Treatment on Livestock Sales, 30 Taxes 885 (1952).

As originally passed by the House of Representatives, section 324 of the Revenue Act of 1951 did not have the sentence about poultry. See H.R. Rep. No. 586, 82d Cong., 1st Sess. 32 (1951). The Senate passed an amendment that added the sentence "[s]uch term does not include poultry; except that such term includes turkeys, regardless of age, held by the taxpayer for breeding purposes, and held by him for 12 months or more from the date of acquisition." See Sen. Rep. No. 781, 82d Cong., 1st Sess. 42 (1951). The Conference Committee kept the rule for poultry, but dropped the exception for turkeys held for breeding purposes. See H.R. Conf. Rep. No. 1179, 82d Cong., 1st Sess. 76-77 (1951). This indicates that when Congress excluded poultry from the definition of livestock, it considered whether to make exceptions and rejected the idea.

It may be argued that, when Congress excluded poultry from the definition of livestock in 1951, it had no way of knowing

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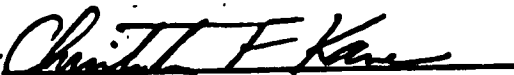
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that farmers, forty years later, would be raising ostriches, emus, and rheas and that Congress may have chosen to treat them differently from other birds, if it had known. Nevertheless, it has long been our position, as evidenced by the regulations, that the term livestock excludes birds.

If you have any further questions, contact Peter Cohn at 622-4930.

Sincerely yours,

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